Optica Lee Borinquen, Inc. *and* Federacion de Optometras de Puerto Rico. Cases 24–CA–6070, 24–CA–6110, 24–CA–6117, 24–CA–6174 and 24–CA–6199

May 26, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On November 5, 1991, Administrative Law Judge Joel A. Harmatz issued the attached decision. The General Counsel, the Respondent, and the Union filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] and to adopt the recommended Order as modified.[3]

The General Counsel and the Union have excepted, inter alia, to the judge's finding that the Respondent would have terminated employee Fernando Benitez even in the absence of his union activity. For the reasons that follow, we agree with the judge that the discharge of Benitez did not violate Section 8(a)(3) and (1) of the Act.

The Respondent asserted that it terminated Benitez, an optometrist assigned to its Plaza Carolina store, because he repeatedly refused to work his assigned schedule. In this regard, Benitez admits that he regularly failed to work his assigned schedule from July 1 until November 1, 1989,[4] despite several verbal warnings and a written warning dated October 24, 1989, which stated, in essence, that he would be terminated if he did not ''immediately correct this situation.'' Benitez also admits that he continued to work less than his assigned schedule for at least 2 days after he received the written warning.

The General Counsel contends that the Respondent's explanation is pretextual, noting that Benitez complied with the assigned schedule from November 1 until his termination on November 8, 1989. However, for the reasons stated by the judge, we find that the Respondent was aware of Benitez' continuing failure to work his assigned schedule when it received his payroll reports shortly before November 8, but was not aware of his subsequent compliance at the time of his termination because those reports had not yet been received at the Respondent's central office.[5]

The General Counsel also contends that the reason given for the termination is pretextual because Benitez was under an individual employment contract with the Respondent when he was terminated and because, prior to the advent of the Union, the Respondent's policy was not to terminate an optometrist during the term of his or her employment contract. However, we note that the General Counsel did not introduce a copy of Benitez' alleged contract into the record and that the Respondent's president, Evelyn Caceres, testified that Benitez was not under a contract at the time of his termination. Moreover, the record shows that in May 1989, the Respondent instituted a policy of increasing the optometrists' daily work schedule by 1 hour as their employment contracts expired. The Respondent's increase in Benitez' hours of work on July 1, 1989, is thus consistent with a finding that no employment contract existed at that time. Moreover, in explaining why he did not comply with the new schedule, Benitez never asserted that the change was contrary to any employment contract he had with the Respondent. Under these circumstances, we do not find that the judge erred in finding that no employment contract existed at the time of Benitez' termination.[6]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The General Counsel has excepted, inter alia, to the judge's failure to find that the Respondent additionally violated Sec. 8(a)(5) and (1) by unilaterally lengthening employees' hours of work. We find no merit to this exception, as the evidence shows that this action was announced and partially implemented by the Respondent prior to the date of the Union's election petition and subsequent certification. Under these circumstances, we decline to construe the Respondent's answer to the complaint as an admission of a violation of the Act in this regard. Accordingly, we dismiss this allegation of the complaint.

[3] We agree with the General Counsel that the Respondent should be ordered to post copies of the notice in both English and Spanish, and we shall modify the judge's recommended Order accordingly.

[4] Prior to July 1, 1989, Benitez' scheduled hours were 9 a.m. to 4 p.m. On July 1, Benitez was transferred to the Plaza Carolina store with a new work schedule of 9:30 a.m. to 5:30 p.m.

[5] Accordingly, we need not decide whether a showing that the Respondent was aware of Benitez' compliance with the schedule after November 1, 1989, would demonstrate that its asserted reason for the termination was pretextual.

[6] The General Counsel asserts that a position statement submitted by the Respondent's former counsel contains an admission that Benitez was under an employment contract at the time of his termination, and further asserts that the judge erred in failing to consider the position statement in his decision. We agree with the General Counsel that the position statement was properly admitted and should have been considered, and we disavow the judge's gratuitous remarks concerning this and other matters. However, having considered the position statement, we find, contrary to the General Counsel, that it is not entitled to significant weight under the circumstances present here, and does not demonstrate that Benitez was under an employment contract when he was terminated. Thus, although the position statement indicates that Benitez had an employment contract at one time, it does not indicate the duration of the contract or whether it was still in force on November 8, 1989. Under

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ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Optica Lee Borinquen, Inc., Guaynabo, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(g).

''(g) Post at its facilities in the Commonwealth of Puerto Rico, in English and Spanish, copies of the attached notice marked ''Appendix.''[80] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.''

IT IS FURTHER ORDERED that the complaint allegation that the Respondent, since March 9, 1990, unlawfully unilaterally increased unit employees' daily work hours by 1 hour is dismissed.

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these circumstances, we find the position statement insufficient evidence on which to conclude, contrary to the judge, that Benitez was terminated during the term of an individual employment contract with the Respondent. Accordingly, we find it unnecessary to pass on the judge's statements at fns. 25 and 43 of his decision that a termination during the term of such a contract could not have been lawful.

Antonio F. Santos and *Jorge Ramos, Esqs.*, for the General Counsel.

Lidia Gonzalez, Esq. (Munoz, Boneta, Gonzalez, Arbona, Benitez & Peral), of Hato Rey, Puerto Rico, for the Respondent.

Cesar J. Dones-Magaz, Esq., of Rio Piedras, Puerto Rico, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This case was tried in Hato Rey, Puerto Rico, on various dates between February 18 and 28, 1991, on an original unfair labor practice charge filed on January 2, 1990, and a consolidated complaint issued on July 31, 1990, alleged that the Respondent independently violated Section 8(a)(1) of the Act by threats of discharge and more onerous conditions of work, including closer supervision and more stringent evaluations, and by statements linking strikes and violence inevitably to union organization. It is alleged further that the Respondent violated Section 8(a)(3) and (1) of the Act by on November 8, 1989, discharging Fernando Benitez, and on March 9, 1990, discharging Eva Lopez Mendez, in reprisal for union activity. Finally, the complaint alleged that, on and after January 1990, the Respondent violated Section 8(a)(5) and (1) of the Act by various actions, including its changing unilaterally conditions of work; refusing, upon request, to provide the Union relevant and necessary information, and engaging in surface bargaining for the purpose of avoiding agreement. In its duly filed answer, the Respondent denied that any unfair labor practices were committed. Following close of the hearing, briefs were filed on behalf of the General Counsel and the Respondent.

On the entire record,[1] including my opportunity directly to observe the witnesses while testifying and their demeanor, and after considering the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Puerto Rico corporation, operates a chain of 32 optical stores in the Commonwealth of Puerto Rico from which it sells lenses, frames, and other optical products. In the course of that operation, the Respondent, during the 12 months prior to issuance of the complaint, derived revenues exceeding $500,000 in value, and purchased and received goods and products valued in excess of $50,000 directly from suppliers located outside the Commonwealth of Puerto Rico. The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that the Federacion de Optometras de Puerto Rico (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

A. *Preliminary Statement*

This case emerges from an organizational campaign waged by a group of optometrists. These professional employees offer services vital to the Respondent's operation. The General Counsel contends that the Respondent reacted coercively, violating Section 8(a)(1), through antiunion propaganda, and, later, after the Union was designated, retaliated by terminating two key proponents of organization, hence violating Section 8(a)(3) of the Act. Finally, the General Counsel contends that, following certification, the Respondent violated Section 8(a)(5) on a number of counts including its manifestation of bad faith by engaging in surface bargaining out of a desire to avoid reaching agreement.

By way of background, it is noted that the Respondent operates 32 optometric shops in the Commonwealth of Puerto Rico. Most are located in the metropolitan area of San Juan. The stores generally are staffed by three or four employees, consisting of a store manager, dispenser (salesclerk), and either an optometrist or a ''general practitioner.'' The general practitioners are medical doctors who are MDs but not cer-

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[1] After close of the hearing, the parties entered a stipulation clarifying the testimony of Dr. Carol Lopez as it appears in the official transcript pertaining to February 20, 1991, which was either incorrectly transcribed or inaudibly recorded. The record is reopened for the limited purpose of receiving that document as Jt. Exh. 1. The corrections in the transcript have been noted and corrected.

tified by the Optometry Commission of Puerto Rico. Though excluded from the bargaining unit, they perform the same functions as the optometrists, providing eye examinations and writing prescriptions. A rivalry appears to exist between the two groups, with the optometrists opposing the use of the general practitioners. Both normally are retained pursuant to annual, automatically renewable individual employment contracts.

The Respondent portrays this case as a direct outgrowth of a shift in management's approach to the optometrists following a change in ownership. Historically, the business was owned primarily by Eduardo Alvarez, the former husband of Evelyn Caceres. The latter held an interest in the firm and was its vice president. On May 31, 1989,[2] following a divorce, Evelyn Caceres assumed full ownership and control of the 32-store chain. In advance of that date, on May 12, 1989, she conducted a meeting with the optometrists in which she suggested that a crackdown was on the way, while highlighting areas in which changes would be made in their employment conditions and improved performance expected.

In terms of actual measures, among her initial steps was a reorganization whereby the optometrists would be subject to supervision by store managers, themselves nonprofessionals. Previously, there was no day-to-day, immediate supervision of the optometrists, who merely reported to a medical director or the president of the Company, Alvarez. It also appears that Caceres sought to alter the method of compensating optometrists by lowering their salaries and imposing a system of incentives designed to reward productivity. The plan called for a shift in status which in all likelihood would have been viewed as demeaning to the optometrists.

The optometrists would respond. Soon after the ascendency of Caceres, they formed their own labor organization,[3] and on July 13, 1989, filed an election petition in Case 24–RC–2271. The election was conducted on October 24, 1989, with the Union certified on November 3, 1989. Contract negotiations opened preliminarily in January 1990, and later continued, eventually lapsing without agreement being reached.

As indicated, the complaint contests the legitimacy of the Respondent's conduct both before and after the election. Apart from the preelection allegations, the Respondent is charged with having violated Section 8(a)(3) by on November 8, 1989, discharging Fernando Benitez, and, on March 9, 1990, terminating Eva Lopez Mendez.

As for the bargaining, according to the complaint the Respondent refused to bargain in good faith, violating Section 8(a)(5) by, since January 1990, unilaterally changing conditions of work; refusing to provide relevant, requested information, and engaging in a course of surface bargaining, evidencing its desire to avoid reaching agreement.

[2] All dates refer to 1989, unless otherwise indicated. However, as shall be indicated below, commencing with sec. III,C,1,b. of this decision, the references shall shift to 1990.

[3] Apart from the Respondent's optometrists, this labor organization is lacking in any representational base.

B. *Interference, Restraint, and Coercion*[4] *(the Preelection Allegations)*

1. Letter of September 14, 1989

On or about September 14, Caceres mailed an antiunion letter to all optometrists.[5] Its legitimacy is challenged on two distinct grounds. First, the General Counsel contends that it conveyed threats of discharge and more onerous working conditions, including closer supervision and more stringent evaluations, in the event of unionization. Second, it is charged that the letter included coercive argumentation which transcends the free speech guarantees of Section 8(c) by describing strikes and violence as an inevitable consequence of unionization.

The initial line of attack requires understanding of the position advanced by the Respondent in urging dismissal of the election petition in Case 24–RC–2271. There, the Respondent argued that the Board lacked jurisdiction because the optometrists were independent contractors. This contention ultimately was rejected in a Decision and Direction of Election, issued by the Regional Director on August 24, 1989.[6]

The Respondent's September 14 letter was apparently drafted after, but without benefit of the Regional Director's determination. In it, Caceres sought to explain the Respondent's position in that regard, while arguing against organization on the basis of the greater controls that would be retained and exercised should the optometrists be found to be employees. Through the following passages, the General Counsel argues that the employees were threatened unlawfully with closer scrutiny and more stringent conditions of work:

> Our legal representation has sustained and sustains the position that no jurisdiction of the National Labor Relations Board exists because I am certain that the future of the company has to be in your hands. That is your only and real guaranty of personal and professional improvement.
>
> . . .
>
> Two parties do exist in this labor relation. However, the mere fact that the Union may prevail does not mean that the company is going to vanish as to its prerogatives and powers to exercise control over the company's activities. This is not so. *What is going to happen is that the company is going to exercise some prerogatives and powers over each of the optometrists which heretofore has not been exercised*. A Union means that due to the existence of divided loyalties between the employer [sic] and the company, *we, as employer, have*

[4] At the hearing, the General Counsel deleted an allegation in Par. 12(d) of the complaint that the Respondent violated Sec. 8(a)(1) through a memorandum issued by Mabel Aponte at the Villa Blanca and Plaza Centro Stores, ''notifying [optometrists of possible] transfers to different optometry stores'' by reason of their union activity.

[5] G.C. Exh. 4. Caceres, in an apparent attempt to distance herself from the content of this letter, testified that it was drafted by an attorney, and that, although she signed and mailed it to all optometrists, she did so without having time to read it. I did not believe her testimony on this latter point, and conclude that, having signed the document, she was fully responsible for the views expressed therein.

[6] G.C. Exh. 3(d).

> *to exercise strict supervision over the work schedule, production, how you take care of the public and also have to evaluate the quality of professional services which the optometrists render at their professional; offices, etc*. All these areas regarding which the company has relied on the professionalism of the optometrists and originates from the premise that only you must control and watch over. *All this professional relation and respect will vanish with the Union.*
>
> Listen closely, inasmuch as a unionized employee, by definition of the law itself, has to be a supervised employee over whom the employer is entitled to control the ways and means concerning all his actions and decisions as to how to perform his work. In our position before the Board, we have set forth that optometrists are not supervised personnel and, above all, that the company has no right to control the ways and means they decide to carry out their work.
>
> That is why we think that this matter before the Board is the product of the initiative of a minority which is ill-advised and is poorly advising and disguising the actual and real facts about what a Union is. That is the minority you have to reject with your vote.
>
> The union will not be able to eliminate the existence of the two parties nor will it limit itself either to creating the situation I just explained. *There are two fundamental consequence that a decision in favor of the Union and against the company is going to bring*.
>
> *The first one is the Company's legal authority to discharge the optometrists*. The existence of a contract to discharge the optometrists in the terms it is drafted does not allow taking action to discharge. And, as a matter of fact, there is not a single case in which this company has violated the terms of that contract to the detriment of any optometrist. The terms of the contract guarantee you the income you earn there in one year and also has the possibility, in the event that the company should violate the terms of that contract, to empower you to file legal action for damages.
>
> *The establishment of an employer-employee relationship does not create an everlasting relation. It is just a relation of permanent employment always subject to discharge without right to indemnity in any case in which the employer has just cause for that action*. In such cases the employer can discharge outright. *Keep in mind that the case of a discharge without cause, contrary to how the current contract protects you, the employee is not entitled to claim damages for such action. So don't believe that you are more protected with the Union than without it*. [Emphasis added.]

On its face, the message conveyed by this mailing is that the attempt by the optometrists to organize created a situation in which, in the eyes of management, the optometrists had rendered themselves vulnerable to closer supervision and discharge, and would lose whatever autonomy they enjoyed previously. The plain, unqualified implication was that, if found to be employees, the Respondent would alter its historic practice, henceforth exercising greater controls over them. In doing so, the Respondent threatened that, purely by virtue of their successful invocation of statutory election procedures—the cornerstone of Section 7 activity—the optometrists would be vulnerable to closer controls and discharge. The Respondent thereby violated Section 8(a)(1) of the Act.

The argument that Caceres also unlawfully associated organization with strikes and violence presents a more difficult issue. In this respect, the General Counsel cites the following segment of the letter:

> *[W]ith the Union reason is going to be replaced by force, good understanding by misunderstanding and harmony by discord*. There is no human entity nor relation nor social project where, when this institution becomes a reality, man progresses and is happier. Always in the short and long run it produces a contrary result. The worst is that when this substitution occurs it then becomes evident that a loudmouthed, agitating and thoughtless minority *tyrannizes* the future of the group it allegedly is representing. *That minority always has a second exit door in the event that the strike, the picketing or the stoppage, etc. fails because that is precisely its profession*. But he who is a bonafide employee who with his work brings food to his home and his job is his only means to make a living to obtain those indispensable and necessary things for a dignified life, for those, Unions are finally no good. Union leaders nearly always throw stones and hide their hands. Later on they blame the responsibility on the employer but the leader keeps working for the Union, getting the benefits it provides him, despite the strike conflict his life level is not affected *while the bonafide employee is at risk of poverty and economic, emotional and psychological hardship which produces violence, discord and labor-management conflict*.
>
> Simply look around you to see if what I am saying is wrong. Evaluate the leaders who would be in charge in case the Union represents you. . . . Ask yourself if he is more concerned for your well-being and that of your family than you are. *Ask yourself if he is going to defend you first rather than himself and his own interests. Ask yourself if you have an exit door in order to endure a labor management conflict full of hatred and violence*. Ask yourself if you have ever seen man progress and be happier in any situation where there is discord, misunderstanding and intolerance. And finally ask yourself if that is the object of a professional. Ask yourself if the image that you are going to develop when, instead of looking for improvement through individual discussion and negotiation of your conditions of work and instead of relying of your ability and talent, *you have to resort to force*, to anonymity, to hatred, to yielding your prerogatives of proper judgment in the performance of your professional work, ask the question to yourself if that is what is suitable for you. If you do not believe in yourself, ask yourself if somebody else can do so. [Emphasis added.]

In my opinion, nothing in this letter substantiates that the Employer wrongfully linked the Union with strikes and violence. Section 8(c) does not require fairness or accuracy, and does not seek to censor nastiness. See, e.g., *Sears, Roebuck & Co.*, 305 NLRB 193 (1991). In this regard, the letter is a low keyed exercise in pejorative, accusatory in tone, drawing on the time worn choice between good and evil. Thus,

unions are portrayed, generally, as the provocateurs of hatred, discord, and misunderstanding, all at the expense of reason. There was no intimation that the Respondent might provoke a strike by refusing to bargain in good faith, or by naked resistance to union demands.[7] There is no reference to collective bargaining or intimation that any store would be closed, or that there would be a loss of work, jobs, or employment. In her convoluted, rambling attempt to persuade the optometrists that designation of the Union would prove to be an act of self-betrayal, Caceres simply opines that, instead of bringing happiness to the workers, unions pursue their objectives, uncaringly, through the use of force, including violence, picketing, and strikes.

Under Board policy, the mere mention that strikes are possible,[8] or the characterization of union leaders as having nothing to lose, or prone to violence and the use of force to achieve their objectives[9] will not alone remove campaign propaganda from the protective guarantees of Section 8(c). In the final analysis, the references to strikes and force in this letter was an attempt to draw upon emotionalism and overstatement, but merely produced an overall message easily recognizable as self-serving hyperbole.

Argumentation of this type is left routinely to the good sense of employees. See, e.g., *Auto Workers (Kawasaki Motors) v. NLRB*, 834 F.2d 816, 822 (9th Cir. 1987). Accordingly, it is concluded that the letter did not suggest that strikes and violence were inevitable consequences of unionization under conditions violative of Section 8(a)(1) of the Act.

2. By Carmen Morales

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act on the basis of a threatening remark attributed to Carmen Morales, the manager of the Humacao store.

Dr. Lopez Mendez, the optometrist at that location, had signed the election petition that led to the Union's certification. She testified that, in December 1989, Morales approached her, stating that if she were Lopez she would save her money because Caceres was going to decline to renew the employment contracts of union supporters, and replace them with general practitioners. Morales denied that she had any conversation with Dr. Lopez concerning the Union, or that general practitioners would be used as replacements for optometrists.

As between them, Dr. Lopez was preferred. Testimony by Morales in other areas was argumentative and implausible to the point of suggesting that she was willing to relate anything that might favor the Respondent's position in the case. Her exposition that the absence of a salesperson on the busiest day of the week would have no impact on sales, that in her store all customers are willing to stand around and wait, and that two salespersons could take care of the trade as efficiently as three struck as unrealistic in the extreme. Based upon the more believable of Dr. Lopez, it is concluded that the threat by Morales, an admitted supervisor, violated Section 8(a)(1) of the Act.

C. *Postelection Conduct*

1. The alleged discrimination

a. *The discharge of Fernando Benitez*

The Union was certified on November 3. Dr. Benitez, an active proponent of the Union, was terminated on November 8.

Dr. Benitez was transferred, effective July 1, 1989, from Caguas to the Plaza Carolina store. The change was memorialized by letter dated June 29, 1989, which also advised that his scheduled hours were from 9:30 a.m. to 5:30 p.m. with 1 hour for lunch, 6 days per week.[10]

Caceres testified, without contradiction, that Benitez initiated this transfer, seeking a store with greater volume of examinations.[11] Caceres went on, credibly, to relate, that Benitez agreed to the new work schedule at Plaza Carolina.[12] Benitez, however, admittedly failed to conform to those hours, claiming instead to have worked regularly thereafter until November 1 from 9 a.m. to 4 p.m.

This noncompliance would soon become an issue. It was initially addressed by Dr. David Miranda, the Respondent's comptroller, who telephoned Benitez in July, 2 or 3 weeks after Benitez' assignment to Carolina Plaza. Miranda instructed Benitez to comply with the 9:30 a.m. to 5:30 p.m. schedule. Benitez claims that he replied as follows:

> I told him I was doing my best to comply with these hours but we would have to sit down and discuss my salary because my salary was supposed to increase and . . . on the contrary was decreased when I started working at Plaza Carolina.

Benitez claims that the change in his daily shift increased his hours without a change in salary, therefore creating a net decrease in his hourly earnings. It does not appear that the Respondent agreed to revise his salary or his schedule.

Benitez simply ignored Miranda's direction, prompting Caceres in a letter to Benitez, dated July 26, to refer to his conduct in light of the agreement on schedule, as follows:

> The information that we have received and that you have confirmed is that you have unilaterally violated said agreement and started leaving at 4:00 in the afternoon. We personally request[ed] that you keep with that agreement and despite that you continue violating the terms that you agreed . . . [to].

Caceres, through that document, issued the following warning:

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[7] Cf. *Christie Electric Co.*, 284 NLRB 740, 808 (1987).

[8] *McCarty Processors*, 292 NLRB 359 (1990); *Agri-International*, 271 NLRB 925, 926 (1984).

[9] *Clark Equipment Co.*, 278 NLRB 498, 499–500 (1986); *Central Broadcast Co.*, 280 NLRB 501, 502 (1986); *Asociacion Hospital Del Maestro*, 272 NLRB 853, 857 (1984).

[10] G.C. Exh. 5(c).

[11] Benitez denied that he requested transfer specifically to Plaza Carolina, but this was not taken as a contradiction of other aspects of Caceres' testimony.

[12] Although Benitez denied that he agreed to his compensation, it is not clear that this denial was broad enough to include his new work schedule. In this regard, I prefer the direct, unequivocal testimony of Caceres.

> If you continue with problems regarding the quitting time we have two options: exercise the right to terminate the work contract or accept your resignation if your non compliance of the contract is caused by strictly personal reasons and you prefer to act in that manner.[13]

Benitez still did not comply. Caceres avers that she talked to him four or five times about this problem prior to October 24, the day of the union election.[14] By letter of that same date, Caceres admonished Benitez as follows:

> Effective July 1, 1989, we sent you a memorandum with the new change of optical center and schedule.
>
> While reviewing our records, these indicate that you are not complying with your assigned schedule. This situation has become intolerant thus practically leaving us with a discharge action as the only alternative.
>
> It is essential that you comply with the schedule, in the same we have complied with you. If you do not immediately correct this situation, we will be forced to take the only measure remaining, as we have warned you so before.[15]

As he had the others, Benitez initially ignored this warning. Between October 24 and November 1, he continued to leave at 4 p.m. According to Benitez, ''two or three days after'' he received and read the October 24 letter, he consulted his attorney, and on advice of counsel, after November 1, he complied with the designated schedule.[16]

Nevertheless, by letter of November 8, within a week after the Union's certification, Caceres terminated Benitez, stating as follows:

> On multiple occasions, we have informed you in person as well as in writing of your consistent incompliance with your schedule, without this shortcoming having improved.
>
> Upon noticing this past fortnight that you have not yet complied with your schedule, we decided to dispense with your professional services as an Optometrist in our company effective today, the 8th day of November 1989.[17]

The discharge took place against a background of overt union activity. Benitez along with all other optometrists who supported the Union appeared at the joint preelection conference. He was one of four optometrists who testified on behalf of the Union at the preelection hearing on August 2 and 4, 1989.[18] On that occasion, in the presence of Caceres, he offered testimony opposing to the Respondent's position that the optometrists were independent contractors. It is noted further that uncontradicted evidence names him as present along with Drs. Enid Molinary and Eva Lopez Mendez, and two representatives of the Respondent, to witness the opening and counting of ballots after the election.

This knowledge coupled with other factors impel the Respondent to disassociate this termination from unlawful considerations. Thus, earlier, the Respondent had declared hostility to the right of optometrists to organize. The step was taken shortly after the Union's designation and certification, and since the employee involved had given testimony against the Respondent's effort to prevent an election, the circumstances reflect sufficient earmarks of reprisal to warrant an inference that union activity was at least a part of the motivation. Thus, consistent with the proof responsibilities assigned by the Board in *Wright Line*, 251 NLRB 1083 (1980), the burden shifted to the Respondent to demonstrate that this was not the case. Under the precedent, this burden is not met simply by verbalizing an ostensibly legitimate ground for termination. The defense must go further, demonstrating ''by a preponderance of the evidence that the action would have taken place even without the protected conduct.'' *Hicks Oils & Hicksgas*, 293 NLRB 84 (1989). Moreover, where pretext is asserted, it must be ascertained whether the employer's assigned ground is credible, so as to substantiate that protected activity was mere coincidence. *Wright Line*, supra.

In this connection, I am convinced that the conduct of Dr. Benitez was a contumacious attempt to seize control of, and impose his own conditions of work. Until November 1, he defiantly refused to abide by his assigned and agreed-upon work schedule. His course of conduct over a 4-month span constituted just cause of a nature that would support termination even in the absence of protected activity.

The effort on the part of the General Counsel to disparage the reasons for the discharge as pretext was unpersuasive. In this connection, a contention is leveled that Benitez was singled out for warning on October 24, though none was forwarded to other optometrists that had refused to work their assigned schedules.

The General Counsel attempts to make the point through the experience of Dr. Enid Molinary, arguing that she pursued a similar course, but received no discipline. The cases are different. Dr. Molinary was transferred to the Caguas store effective July 1, 1989. Earlier, in June 1989, Molinary was informed by letter that her schedule at this store would be changed to 9:30 a.m. to 5:30 p.m. She declined to adhere, instead working from 10 a.m. till 4:30 p.m. Her deviation was initially accepted and then, when called to her attention

[13] R. Exh. 1. In his testimony, Benitez, before being confronted with this letter, could not recall a written warning prior to October 24.

[14] Store Manager Genny Bravo related that she reported the failure of Benitez to comply with his agreed-upon work schedule continuously to headquarters from the inception of his assignment to the Carolina Plaza store.

[15] G.C. Exh. 5(b). Benitez could not recall that Caceres had warned him verbally concerning his failure to abide by his assigned schedule. I believed Caceres.

[16] G.C. Exh. 6.

[17] G.C. Exh. 5(a).

[18] Benitez was the union president. He claims that he was named to this post in June 1989. He did not, however, sign the election petition which was filed on July 13. (G.C. Exh. 3(a).) He claims, without corroboration, to have identified himself as union president at the informal prehearing conference on that petition. The conference was attended by lawyers who at that time represented the Respondent, but have since been replaced. Neither Caceres, nor any other functionary of the Respondent was identified as present on that occasion. The parties agree that, while testifying at the preelection hearing, Benitez was not identified as the union president. There is no direct evidence conflicting with Caceres' denial that she was aware of his official status in the Union at any time prior to the discharge. I find that she lacked such knowledge. Nonetheless, Caceres acknowledged that she attended the preelection hearing on the date that Dr. Benitez testified.

once, she complied. Thus, on March 3, 1990, she reverted to her assigned schedule, having received a letter from Aponte instructing her to do so.[19] The contention that no one from management between July 1989 and March 1990 had mentioned her noncompliance is understandable in light of her own further testimony that at the time of her 1989 transfer, she protested the new schedule to both Caceres and David Miranda in a conversation which ended with Caceres asserting that the new hours would be discussed when Molinary's contract expired in 1990. Molinary's case does not suggest that the Respondent condoned the defiant attitude manifested by Benitez. Thus, unlike Dr. Benitez, Molinary did not agree to the schedule imposed on her by the Respondent in June 1989.[20] In fact, in her case, there was room for the claim that this latter schedule conflicted with her personal employment contract which at least arguably required her merely to work 6 hours daily.[21] Other evidence enforces the inference that the difference in treatment of Molinary and Benitez was founded upon a difference in circumstances and not union activity. For, Molinary was also an active proponent of the Union. Indeed, she had acted as the Union's spokesperson at the informal negotiating session in November 1989, well prior to her compliance with the schedule imposed by the Respondent earlier that summer.

General Counsel also faults the Respondent's propriety in effecting the discharge with knowledge that since November 1, Benitez had complied with the assigned work schedule. The Respondent does not deny this period of compliance, but observes that at the time of discharge it was unaware of this change. First, Sandra Cordero, a payroll clerk testified that the attendance records covering the timeframe October 30 through November 11,[22] would not have been received by the payroll department until Monday, November 13, at the earliest. Consistent therewith, Caceres denied that, at the time, she possessed records evidencing that Dr. Benitez had finally complied. She testified that she relied on the ''payroll'' records, including the attendance sheets and the sales forms.[23] The attendance sheets covering the payroll period beginning November 1, were not available, and the sales forms covering that same period would have been submitted to the *payroll* department even later.[24]

Accordingly, it is concluded that the General Counsel has not cast doubt sufficient to overide the persuasive evidence that the Respondent would have discharged Benitez even if he had not engaged in union activity. Hence, it is concluded that the Respondent did not violate Section 8(a)(3) and (1) of the Act by discharging Dr. Benitez.[25]

b. *The discharge of Eva Lopez Mendez*

(1) The prima facie case

Dr. Lopez Mendez was an early union supporter. Her activity included the filing of the representation petition in Case 24–RC–2271, a document which bears her signature.[26] She attended the preelection hearing, and was among the union supporters who were present to witness the opening and counting of ballots on the day of the election. Following certification, in November 1989, she, along with five other optometrists attended a meeting with the Respondent where the Union initially presented its proposed collective-bargaining agreement. In December 1989, because of her support of the Union, Lopez was unlawfully threatened by her store manager with termination.

Against this background, by letter dated March 1, 1990,[27] Evelyn Caceres informed Lopez as follows:

> As you know, your work contract for professional services expires on April 5 of the present year.
>
> Said contracts provide for a 30 day advanced notice with the purpose of entirely renewing same. Since there was an election on the part of Federacion de Optometras whereby it was decided to constitute themselves as an appropriate unit to represent the Optometrists before Optica Lee Borinquen, by these means we

[19] G.C. Exh. 13(a).

[20] G.C. Exh. 13(b).

[21] G.C. Exh. 13(b). Benitez had no similar protection. Prior to the ascendency of Caceres, Benitez had a special status in the operation, which dispensed with necessity that he sign an employment contract. Thus, in his case, the assigned schedule did not conflict with any right bestowed contractually.

[22] R. Exh. 18.

[23] Caceres testified that she did not confer with the Plaza Carolina store manager as to whether Benitez, at the time of discharge, continued to work his own schedule. In light of his historic pattern of noncompliance, particularly since the October 24 warning, Caceres had no reason to assume that there had been any change.

[24] The General Counsel at fn. 6 of its posthearing brief argues that because Caceres admitted that sales forms arrived at headquarters within 24 hours after the close of work, they were available when she made her decision, ergo, it is asserted that she must have known at the time of discharge that, consistently since November 1, Benitez was working in compliance with her demands. Although the record is ambiguous in this respect, Caceres testified that the discharge decision was made only with benefit of the attendance records, explaining further that the sales forms are used for purposes of commissions only, and are not sent to the personnel or payroll department. It is true that Caceres seemed confused as to when these documents would be forwarded to headquarters, first testifying on several occasions that they would be received after the attendance records, but, then, on cross-examination, stating that she was not sure but believed they were sent every day. However, on balance, I am inclined to give her benefit of the doubt, and conclude that she was unaware as of November 8 that Benitez had made a turnabout.

[25] Uncontradicted evidence substantiates that at the time of the discharge, there was no individual employment contract covering Dr. Benitez. Had his tenure been governed by such an agreement, and had the termination occurred during its term, notwithstanding the existence of valid cause, the Benitez discharge would have been unlawfully accelerated. Thus, prior to the advent of union activity, the Respondent did not discharge optometrists for cause under those conditions. Instead, those with a poor work history were tolerated until their contract expired, and then eliminated passively, by a failure to renew. This practice was changed solely because the Regional Director in his Decision and Direction of Election rejected the Respondent's position that the optometrists were independent contractors. Thereafter, Caceres in her letter of September 14, 1989, declared that optometrists, should this prove to be the case, would for the first time be vulnerable to involuntary termination in the middle of their individual employment contracts. This change in practice, occasioned solely in reaction to the invocation of Board remedies, would not, under any circumstances, support a lawful discharge of an optometrist during the term of his or her personal employment contract.

[26] G.C. Exh. 3(a).

[27] Henceforth, all dates shall refer to 1990, unless otherwise indicated.

> are hereby informing you that your contract will not be renewed for the term specified, and you will continue under a month by month contract until a final decision is reached with regard to the contract to be executed between the parties.
>
> For any doubts, please communicate with our central offices.[28]

Less than 10 days later, on March 9, Dr. Lopez was terminated. The discharge of a key protagonist of the Union, whose union activity had been the focus of an unlawful threat, shortly after a high level assurance of continued employment, suffices, at least in part, to warrant an inference that proscribed considerations influenced that decision. Accordingly, as in the case of Dr. Benitez, the burden was on the Respondent to demonstrate that Lopez would have been terminated even had she not engaged in union activity.

(2) The defense

The Respondent cites two reasons for the termination. Both relate to events occurring well before the March 9 discharge. The first, and most significant incident, took place on Saturday, February 24, when Dr. Lopez declined to examine several customers. The second, founded on an alleged ''negligent'' handling of an examining lamp, dated back to February 10. These grounds were formally described in writing to Dr. Lopez by Mabel Aponte, Respondent's personnel manager, as follows:

> On Saturday, February 24, 1990, on the date when the manager of the optical center, Carmen Morales, was absent because of illness, around 3 p.m., you refused to take care of three (3) patients who went to the optical center to have their vision examined. In spite that you were required to provide services to those patients, you continued in your refusal, offering as an ''excuse'' that you were ''tired.'' Your conduct prevented that the established sales goals be reached, in addition to the uneasiness caused in the patients by the lack in service.
>
> I would like to bring up to your attention that you have not been using the optical equipment with the proper care and diligence. I specifically refer to the lamp of the chair used to administer examinations. This equipment had been repaired on Saturday, January 22. Last Saturday, February 10, to the technician's surprise, who had to return again to repair it, finding the same problem of January 22: The defective wires were broken because they were twisted like a braid. You had to be given instructions by the technician on how to operate the lamp, in spite of your experience in the handling in the above mentioned equipment.
>
> Exactly as Mrs. Evelyn Caceres pointed out to you in the memorandum of July 29, 1989, the regular work schedule assigned to you is from 8:30 a.m. to 4:30 p.m. with an hour to have your meals.[29] It is unacceptable that you decide on your own not to provide the services for which you have been contracted, within the schedule assigned to you.
>
> Your conduct adversely affects the smooth running of the business, the good name of the business and professional reputation of the Optica Lee Borinquen, and, therefore, it cannot be tolerated. This conduct is of such importance that management has reached the decision to discharge you immediately.[30]

(3) The February 24 incident

Dr. Lopez did not deny that she refused to examine several patients on Saturday, February 24. She avers that this was a busy day, in which she examined 13 patients, plus about five follow up examinations, without taking her lunchbreak until 3 p.m., the last one-half hour of her shift.[31] She admits that she was told by Assistant Store Manager Cecilia Izquierdo and by a dispenser, Juan Carlos Rivera, that two patients wished examinations and that she responded, ''please I'm having my lunch; . . . please make another appointment for Monday.'' A third patient was rejected by Dr. Lopez because he was incoherent and she feared that he was not a legitimate customer. Dr. Lopez left the store at 3:30 p.m., her customary quitting time.

Concerning the events of February 24, the Respondent called Rivera and Izquierdo, along with another individual, Alberto Sanchez, an optician employed of Pan American Optical Manufacturing,[32] to dispute the timing and reason given by Dr. Lopez for refusing the examinations.

Rivera testified that on February 24, at 2:45 p.m., a patient entered for an eye exam. Rivera informed Dr. Lopez of that fact. The latter replied that there would be no further examinations that day because she was tired. At the time, according to Rivera, Lopez was reading a book. Rivera told the patient to return on Monday. Rivera states that the patient did not return.

Cecilia Izquierdo testified that on February 24, at 2:55 p.m., she referred a patient to Dr. Lopez for examination. Dr. Lopez refused, stating that she was very tired. Izquierdo insisted that Dr. Lopez test the patient because the store needed one sale to meet quota. She again refused, stating, no, she was too tired, and instructed Izquierdo to make an appointment for Monday.[33]

Alberto Sanchez testified that on February 24, he was in the Humacao store for the purpose of providing training to Juan Carlos Rivera. He was present for the entire day. The training was provided in the same room where Dr. Lopez would take her breaks. He avers that Dr. Lopez was in the room, while he was in attendance there from 2:45 to 3 p.m.

[28] G.C. Exh. 8(d).

[29] Lopez was asked to work this schedule upon transfer to the Humacao store. However, her employment contract only obligated her to work from 9 a.m. to 3:30 p.m. (G.C. Exh. 8(a).) Like other optometrists, including Enid Molinary, She elected to adhere to her contractual schedule because the Respondent refused to compensate her for additional overtime.

[30] Aponte actually forwarded three documents, the first on March 9, with the subsequent documents designed to correct the date of the February 24 incident. G.C. Exhs. 7(a), (b) & (c). One such document, though dated March 9, actually was revised on April 4, and later delivered to Mendez. G.C. Exh. 7(c).

[31] Monthly sales records indicate that sales volume on February 24 was the second heaviest of any day that month. G.C. Exh. 12(c).

[32] This firm also is owned by Caceres. It provides support services to the Respondent since engaged in the processing of eyeglasses on the latter's behalf.

[33] Izquierdo testified that while Dr. Lopez was not eating at the time, she did not know whether Dr. Lopez was taking her lunchbreak when she made the examination request.

He claims to have observed Dr. Lopez reading a book, when at 2:45 p.m., she refused, at Rivera's request, to examine a patient. Later, according to Sanchez, Rivera returned indicating that there were two additional patients seeking examination. In each instance, Lopez declined the examination, allegedly stating that she was too tired, while Rivera persisted that the patients be examined. Sanchez adds that later, Dr. Lopez commented to him, ''what do these people think, I'm very tired, I'm exhausted and I'm not going to do any examinations.'' He denies that Lopez was eating.[34] He did not identify Izquierdo as having appeared in the room at any time that afternoon.

Store Manager Carmen Morales was absent on February 24. She testified that when she returned to work on Monday, February 26, employees reported that Dr. Lopez failed to treat patients at 3 p.m. on February 24.[35] Morales reported this immediately to Aberlyn Garcia. The latter arranged for Morales to meet concerning the incident on March 5.

Morales did not prepare a written report until March 5. The document also contained the signatures of Rivera[36] and Izquierdo.[37] It alleged that ''Dr. Lopez refused to give her professional services to several patients'' upsetting the patients and causing the store to fall short of established sales goals. (R. Exh. 2.)

(4) The examining lamp

Concerning the allegations pertaining to the lamp, Dr. Lopez avers that in January she reported that an electrical discharge was being emitted from her examining chair. Their was no response. Eventually the lamp broke down. This occurred when Dr. Lopez' replacement, Dr. Hector Perez was working. To her knowledge, Jose Caceres, the brother of Evelyn Caceres repaired the lamp on Saturday, January 22. A couple of weeks later the lamp again ceased functioning, once more on the shift of Dr. Perez. Jose Caceres returned on February 10, repairing the lamp, this time, advising Lopez that the cables on the lamp had been twisted, while admonishing her not to move the lamp so often. She avers that she pointed out to Caceres that, to perform her duties, it was necessary to move the lamp.

Jesus Caceres, the general manager of Pan American Optical, and the brother of Evelyn Caceres, testified that he had to go to the Humacao store twice to repair the wire in the overhead examining lamp that apparently had been broken because of unnecessary twisting in use. He agrees that he repaired the lamp both on January 27 and February 10. He avers that he submitted a report to Evelyn Caceres on February 12, which stated the entire case against Dr. Lopez:

> Last [S]aturday, February 10, I visited . . . Humacao because I had been informed that lamp of the visual examination chair was not working. Two weeks earlier, [S]aturday, January 27, I had visited this optic to fix the same problem. That time as well as [t]his . . . the electrical wiring was broken. I spoke to Dr. Eva Lopez and told her that I had installed new wiring in the lamp and in only two weeks the wiring had broken again. I told her that you didn't have to turn the lamps around and around as apparently was happening since the wires looked like braid and when they were bent they broke. The necessary movement for the lamp is only 450. I don't know why they twist and twist till they break the wires.[38]

Jesus Caceres acknowledged that this problem arises in all stores, thus, explaining use of the term ''they'' in the above report. He asserts, however, that, although the wiring might go bad after several years of use even in the hands of an experienced optometrist, normally the breakdown occurs at the hands of a new inexperienced optometrist. He describes the incident at Humacao as unprecedented, for he never before was required to return after making the repairs.

(5) Concluding analysis

I was singularly unpersuaded by the Respondent's explanation for this discharge. The examining lamp incident struck as pure afterthought. Neither Morales, Aponte, Evelyn Caceres, nor any other of Respondent's managerial staff ever mentioned the matter to Lopez. There was neither written, nor oral warning in that regard. In the case of Evelyn Caceres silence concerning the issue is indicative of the rapacity with which the matter had become stale, for, having received her brother's February 12 memo much earlier, the lamp did not preclude Caceres from on March 1 advising Dr. Lopez that, in April, after expiration of her contract, employment would continue on a month to month basis. The resurrection of a condoned offense that never before had been mentioned to the employee often provides the framework for sham.

The February 24 incident had characteristics of a similar bent. Mabel Aponte, who lacked educational background in the field of personnel administration, testified that she alone made the decision to terminate Lopez after discussion with certain individuals whom she did not identify.[39] She avers that she terminated Lopez without prior warning ''because her conduct was of a type that the company could not tolerate because she denied attending three patients that went to the optical store to make an eye examination.'' While I have no doubt as to the Respondent's concern, the facts show little sense of emergency. It took almost 2 weeks to effect this ''summary'' termination. During that period, there was no attempt to communicate with Lopez. In an event, suspicion is capped by other persuasive evidence showing that the Re-

[34] Sanchez did not strike me as a particularly reliable witness. He admittedly was not asked for his version of the incident until March 26, when, as part of an investigation, he was called in by the Respondent's attorney. I specifically did not believe that he was aware of the precise time that Rivera appeared to request examination of the first patient. Contrasted with other aspects of his testimony, this refinement seemed reflective of a selective memory.

[35] Contrary to the testimony of Rivera and Izquierdo, records maintained by the Respondent, but containing notations by Dr. Lopez, reflect that she examined her last patient on February 24 at 3 p.m. G.C. Exh. 12(p).

[36] Rivera could not recall when he signed the document. He did recall that on Monday, February 26, he reported the incident to Store Manager Morales, who, in his presence, telephoned the central office.

[37] Alberto Sanchez was not mentioned in this document.

[38] R. Exh. 4.

[39] It is impossible to accept that Evelyn Caceres was not among them. I am convinced that at all times the ''right hand'' was fully mindful of the actions of the ''left.''

spondent would not have imposed such drastic discipline were other considerations not involved.

Of empirical significance is evidence of disparate treatment. In this regard the record amply demonstrates that other optometrists engaged in equally offensive conduct which prevented customers from receiving examination, yet were corrected through lesser forms of discipline.

Dr. Jose Luis Martinez was a multiple offender. On January 31, he failed to perform an examination at request of a company auditor. On March 6, only a few days prior to the discharge of Lopez, was guilty of a second offense. This was handled through warning dated March 13, which acknowledged several other occasions in which Dr. Martinez refused to examine patients during the last one-half hour of his shift. The warning included the following explanation for not effecting discharge:

> [W]e have decided to give you another opportunity and only give you an admonishment letter, since when on March 8, I explained to you that it was your responsibility to examine the patient . . . you complied with your duty of performing an examination upon him, we will not take other more severe disciplinary measures against you.[40]

Dr. Lopez was not afforded a similar opportunity to correct what apparently was a single aberration.

Similar misconduct brought a lenient reaction on February 8, 1990, when Dr. Myriam Martinez only received a written warning despite her rejection ''in an insubordinate manner'' of Mabel Aponte's order that she replace an incapacitated optometrist at a high volume store. The circumstances reflected a ''pressing need'' to meet demands for examinations at that location. (G.C. Exh. 9(a).) Aponte, only a month before the termination of Lopez, treated Martinez' conduct, though potentially leaving a busy store without optometric service for an entire day, with an act of grace:

> Despite the fact that you stated that you would not comply with these orders and that you'd rather quit the job, I have decided to give you another opportunity, because I believe you reacted without thinking.

Dr. Charlene Cordero, on July 31, 1990, merely received a written warning for the following offenses:

> Last Friday, July 27, 1990 you were absent from work without notifying or submitting any excuse. On Saturday July 28, after completing your work at the Levittown eye center, approximately at 1:30 p.m. there were still three (3) patients waiting to be examined, one of which was sent to the eye center of Santa Rosa, which was where you were assigned to work in the afternoon, so that you examine them there. Notwithstanding, you did not show up at your work in the afternoon at the Santa Rosa eye center, as was your duty. You did not notify the manager of Santa Rosa either that you would not show up to work nor subsequently submit any excuse for such absence. [G.C. Exh. 9(c).]

[40] G.C. Exh. 9(b).

Basically I would agree with the Respondent that the refusal to provide examinations during working hours is a serious offense. However, the above cases indicate that, while Lopez was not even contacted for her version of the story, others no less guilty, were counselled and warned. Indeed these latter cases reflect that a key union adherent was victimized by a disparate application of disciplinary standards to an extent obviating a finding that her discharge would have occurred even if she had not engaged in activity protected by the Act.

The timing of the discharge in light of the Respondent's acknowledged difficulty in recruiting certified optometrists during the same timeframe also supports the General Counsel's claim of pretext. Aponte testified that 1990 was the most difficult year to hire optometrists, and it appears that prior to the Lopez discharge, the Respondent was attempting to recruit optometrists. As part of the effort, advertisements were placed in a periodical, producing results, given feint praise by Aponte, as follows:

> Well, I would say they were very favorable. But the majority of them [applicants] did not have their license, the ones that wished to work, it's because they did not pass their Board exam.[41]

Thus, while the Respondent was faced with difficulties in staffing its stores, it departed from the existing disciplinary pattern to discharge the individual most overtly responsible for the election that resulted in designation of the Union.[42]

In sum, the General Counsel has discredited, effectively, the testimony offered to substantiate the Respondent's grounds for terminating Lopez, thus, enforcing the inference of discrimination that arises from the case-in-chief. Accordingly, as the Respondent has failed to demonstrate by credible proof that Dr. Lopez would have been terminated had she not engaged in union activity, it is concluded that the Re-

[41] R. Exh. 9(b).

[42] Added concern for the bonafides of the Respondent's defense emerges from one of its witnesses, Hector Sauri, an employee of a firm that contracts with the Respondent for auditing customer service in its stores. Sauri claims that after a visit to the Humacao store on March 6, he completed a handwritten report mentioning that a clerk had advised that examinations are not given at that store after 3 p.m., and in any event that the optometrist was not in the store at the time. R. Exh. 3. The report goes on to state: ''According to a conversation with David Miranda Dr. Lopez leaves at 4:30 P.M.'' Sauri states that he did not at the time know the names of personnel in the store, and did not believe that he talked to David Miranda and would have no reason to do so. Sauri first attempted to explain away the inconsistency between the quoted statement and the limits of his personal knowledge by first testifying that the statement was based on ''my supervisor's instruction he told me that the doctor was supposed to leave at 4:30.'' Sauri then backtracked denying that he put this in the report pursuant to instruction, stating that he himself considered this relevant because the optometrist was not available to provide an examination. Sauri was no more credible than his report, which insofar as it included matters collateral to his direct observations derived from visiting the store, was beyond the scope of his duties. In my opinion, the inclusion of this reference was explainable solely as a crude attempt to entwine the facial indifference of an independent third party in a scheme to demean Lopez.

spondent thereby violated Section 8(a)(3) and (1) of the Act.[43]

2. The 8(a)(5) allegations

a. *Unilateral Action*

(1) The Undisputed Allegations

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by, since January 1990, by unilaterally and without notice or bargaining with the Union, changing conditions of work. In this respect, the Respondent admits rescinding sales commissions on color contact lenses, and increasing the minimum daily work hours on days off without a commensurate increase in earnings. The answer also admitted that these changes were implemented without notice, or opportunity for bargaining. Neither change was pursuant to any announcement or implemention taking place before the Union's certification. In the circumstances, as both affected a mandatory subject of bargaining, the Respondent's action independently violated Section 8(a)(5) and (1) of the Act.

(2) The disputed changes

(a) *The use of general practitioners*

The certified unit excludes general practitioners even though they perform the same work as the optometrists. The General Counsel contends that the Respondent violated Section 8(a)(5) and (1) by since March 1990, broadening its utilization of general practitioners by hiring them in predominant numbers to fill vacancies in jobs formerly occupied by certified optometrists.[44] The Respondent explained that it did so, but argues that the change in profile was dictated by labor market conditions, beyond its control, which made it impossible to recruit certified optometrists.

Until 1985, no educational institution in the Commonwealth of Puerto Rico prepared and graduated optometrists. Thus, prior to 1985, the Respondent employed few, if any optometrists. All examinations were performed by medical doctors, who were not graduates of a school of optometry and not certified by the local board of optometry.

In 1985, Interamericana Universidad graduated its first class of optometrists. The Respondent, in the years that followed preferred to hire optometrists, but continued to retain the general practitioners, apparently only on a supplementary basis. This use increased dramatically several months after the Union's certification. Thus, In March 1990, the Respondent employed about 26 optometrists and only about 6 general practitioners. At the time of the hearing the ratio had reversed itself with the Respondent employing only 7 optometrists, but filling in with 19 general practitioners. (G.C. Exh. 2.)

In 1989, a critical shortage of certified optometrists emerged. In 1989 and 1990, many optometrists went into private practice, and, despite large graduating classes, few were passing certification exams. In 1990, despite the largest graduating class, only about three passed their boards. In consequence of the shortage, the Respondent hired only four to six licensed optometrists in 1989. In addition to manning its business with general practitioners, the Respondent looked ahead, hiring uncertified graduate optometrists, who worked as dispensers, pending successful completion of their board examinations. Personnel Manger Aponte credibly testified that general practitioners were hired solely to fill the void created by the inability to recruit optometrists.

The General Counsel contends that that the hiring process is a mandatory subject of bargaining which may not be altered without allowing the Union an opportunity to bargain. While this may be so where management has defined a hiring policy or systematic approach or formal rules governing hire, I am aware of no precedent that makes the Union a partner with management in connection with isolated action occurring on an ad hoc basis during the actual hiring process. In this context, the duty to bargain assumes, at a minimum, that the employer's action is founded upon an area of discretion.

On this record, there is no evidence that the Respondent altered its hiring philosophy after the Union's designation. The evidence fails to suggest that it declined to hire a single optometrist that applied for work, that their was any reduction in its efforts to recruit those certified in that profession,[45] or that the general practitioners were accorded a preference over qualified optometrists. On the other hand, the evidence makes plain that the ratio was not a byproduct of management plan or policy concerning employment criteria, itself of a bargainable nature, but a pattern that emerged from ad hoc hiring decisions influenced by labor market conditions. As between the two classes of professionals, the Respondent had neither alternative, nor choice.[46] In short, to sustain the alleged violation is to assume that the Act requires clearance with the statutory representative before an employer might take favorable action on an individual employment applications. The law does not support this notion. See, e.g., *Star Tribune*, 295 NLRB 543 (1989). The 8(a)(5) allegation in this respect shall be dismissed.

[43] Even were I to find that the Respondent had maintained its burden in this respect, a more limited violation would inure. For, Lopez was discharged during the term of her contract. As heretofore indicated, action at that time constituted an implementation of a change in practice, occasioned solely by the Regional Director's determination that optometrists are employees, rather than independent contractors. Thus, had the optometrists not invoked the election process of the Board, the Respondent would have deferred action upon any misconduct until expiration of Lopez personal employment contract, then simply declining to renew. Thus, by acting on an accelerated basis, the Respondent would, in any event, have violated Sec. 8(a)(3) and (1) of the Act. However, on this theory, the remedy would be confined to the period prior to expiration of the employment contract in April 1990.

[44] The Respondent was permitted at the hearing to deny this allegation, after clarification of the General Counsel's theory in this respect.

[45] See, e.g., R. Exh. 9.

[46] As I indicated at the hearing, evidence proffered by the Respondent was initially misconstrued by the me as an attempt to substantiate economic justification. Later, my misinterpretation was corrected, and the General Counsel was informed that he would be relieved of a stipulation entered in reliance upon my stated position, and hance was obligated to combat the Respondent's case in this respect. This produced evidence limited to a document which signified that, while only three candidates passed the optometric examination in August 1990, 15 others successfully completed a repeat examination given 3 weeks later and were certified subsequently on an undisclosed date. G.C. Exh. 20.

(b) *Employment rules*

The complaint was amended at the hearing to allege that the Respondent, on or about April 17, 1990, violated Section 8(a)(5) and (1) of the Act by promulgating revised rules and regulations concerning discipline and disciplinary procedures. The revisions in question bear that date, but Evelyn Caceres acknowledged that they probably were not distributed to employees until 1 or 2 months late.[47] The Respondent concedes that the new rules were promulgated without affording the Union notice or an opportunity to bargain concerning these changes in guidelines published earlier in 1987. The Respondent defends on grounds that the changes were merely a codification of revisions that predated the Union's certification.

Analysis of the question requires comparison of two sets of rules, one dated May 15, 1987, and that under interdict of the complaint, dated April 17, 1990. A cursory comparison of the two documents reflects a plethora of close factual and legal questions. Thus, many of the revisions merely suggested nonnegotiable clarifications or a more elaborate recitation of a preexisting requirement. Others resemble adjustments already published by the Respondent at a time when it was under no duty to bargain. Finally, there are revisions operative only with respect to nonunit personnel.[48]

Having examined the documents, it is clear that for the most part the 1990 revisions were nonbargainable, but that their have been substantive additions not embraced by the 1987 version which would be subject to duty to bargain in advance. My views in this respect as they bear upon the topics mentioned by the General Counsel are outlined below:

Sick Leave. The revisions as to ''how'' employees are to report their absences,[49] ''how'' they are to justify absences, and what action will be taken by the Employer in connection with such proof,[50] amounted merely to language adjustments which either codify previously announced procedures,[51] eliminate ambiguity, or articulate procedures undeclared, but implicit in an existing body of rules or restrictions. The standard governing the employer's obligation in such circumstances recently was restated by the Board in *Bath Iron Works Corp.*, 302 NLRB 898 (1991):

> When changes in existing plant rules . . . constitute merely particularizations of, or delineations of means for carrying out, an established rule or practice, they may in many instances be deemed not to constitute a ''material, substantial, and significant'' change. Only changes of this magnitude trigger a duty to bargain under the Act.

Consistent with the foregoing, it is concluded that the sick leave revisions were not of such a nature that their implementation impinged upon the representational rights of employees. This would have been the case even had they been invoked on a case-by-case basis and unpublished. In each instance, the revision was subsumed within management's right to police and administer existing employment terms. See *Trading Port, Inc.*, 224 NLRB 980, 983 (1976). Accordingly, the Respondent did not violate Section 8(a)(5) and (1) of the Act in this respect.

Leave Without Pay. The two discernible changes in this provision produce varying results. First, the change in identity of the person charged with administering the benefit merely entailed a reallocation of supervisory authority which was purely within management's exclusive right to designate its representatives. The Union held no bargainable interest in this matter. On the other hand, the exclusion of optometrists from eligibility for leave without pay was a substantive change of an unprecedented nature, having detrimental effect upon unit employees. As such it was negotiable as a new term, and the failure to notify and bargain violated Section 8(a)(5) and (1) of the Act.

Judicial Leave. The Respondent contends that the changes reflected in the 1990 rules were made in order to comply with duly enacted laws of the Commonwealth of Puerto Rico covering this subject matter. However, under the precedent, this furnishes no justification for bypassing the exclusive representative as to a bargainable subject. Nevertheless, all 1990 revisions in this area were outside the realm of negotiability. Language pertaining to notification, proof of appearances, limitation on compensability, and the right to request annual leave for jury duty were nonsubstantive matters implicit in existing conditions and subject to clarification by management without intervention of the Union. The only issue of concern is the express omission in 1990 of a 1987 exclusion from authorized leave in the case of those subpoenaed as defendants. Thus, under the new rules, unlike 1987, an employee subpoenaed as a defendant in a criminal case will be entitled to judicial leave. This, upgrading of employee benefits is sufficiently slight to be diminimus and within that category of changes that need not be committed to compulsory bargaining. The 8(a)(5) and (1) allegation in this respect shall be dismissed.

Employee Purchases. The 1990 publication lowers discounts on the purchases by employees on their own behalf and on behalf of relatives on untinted glasses, sunglasses,

[47] G.C. Exh. 10(b).

[48] There is no requirement that a party file a posthearing brief, and hence in no obligatory sense need its content be useful. However, when the allegation is general, but comprehensive, and the evidence is multifaceted, guidance on the part of counsel is rightfully expected. At the hearing, the warned counsel for the General Counsel that in light of the last-minute nature of this allegation, and its breadth, rules omitted from the discussion of facts or rationale in his posthearing brief, would be taken as a concededly legitimate. In its posthearing brief, counsel for the General Counsel allowed the issue to hang on an abstract declaration that the 1990 version of the rules effected changes pertaining to sick leave, leave without pay and judicial leave, eyeglass and contact lens purchase policy, restrictions on personal visits, rules regulating proper attire, and disciplinary procedure. The questions of whether, how, and why the Employer's actions as to each item exceeded legitimate prerogatives are left to my unaided resources. The processing of this decision was slowed also by the failure, in the brief filed on behalf of the Respondent, to include a single citation of case authority.

[49] In its posthearing brief, the Respondent states that this language was contained in a memo dated February 15, 1989. No exhibit number is cited for such a document. My search through the numerous exhibits has failed to locate any document fitting that description.

[50] By memo dated March 22, 1988, employees were informed that medical excuses may be subject to verification. There is no difference between this announcement, made prior to the advent of the Union, and a like declaration in the 1990 revision. (R. Exh.7(a).)

[51] See, e.g., R. Exh. 7(a) re: Verification of medical excuses.

and contact lenses.[52] Although the Respondent's counsel sought to elicit testimony from Caceres that at a meeting with optometrists on May 12, 1989, prior to organizational activity, these changes were discussed with employees, the resulting testimony was vague, and it is considered unlikely that she explored the matter in detail on that occasion.[53] Accordingly, I am not persuaded that Caceres' remarks at that time were coextensive with the substantive changes effected through the November 10 publication. The revisions were new in terms of their impact upon conditions of work, and could not be implemented without first negotiating with the Union. See *Owens-Corning Fiberglas*, 282 NLRB 609 (1987). By failing to do so, the Respondent violated Section 8(a)(5) and (1) of the Act.

Personal visits policy. The 1990 revision bans nonbusiness personal visits during working hours, even from coworkers. The 1987 version permitted nondisruptive personal visits in the reception areas, and, apparently without restriction, if permission is granted by a department manager. The Respondent contends that this change was an amplification of a job description issued in January 1989 covering ''store managers.'' (R. Exh. 7(f).) That document authorized store managers to ban personal visits during working hours. The 1990 revision entailed a material change in the 1987 rule. Under the latter, employees, including the optometrists, were not precluded from engaging in nondisruptive visitation. They were restricted in that area only if the store manager intervened to prohibit it. However, the 1990 change banned nondisruptive visitation absolutely, while removing any discretion held by the store managers to permit the practice. The change was substantive, a material variance from existing privileges and should have been negotiated. By failing to do so, the Respondent violated Section 8(a)(5) and (1) of the Act.

Appropriate attire. The changes affecting unit employees in the 1990 revision appears to be limited to a more detailed statement on appropriate dress than previously in effect, as mentioned in both the 1987 rules, and the individual employment contracts. (G.C. Exh. 16(d).) In this area I detect no material variation from existing rules.

On the other hand, the 1987 rules contained no provision for wearing identification tags. However, by memorandum dated March 29, 1989, employees were informed that preparations were underway to supply them with identification tags.[54] By another, dated July 21, 1989, the Respondent established an express requirement that they be worn visibly.[55] Accordingly, in the case of the identification tags, the 1990 rules reflected no change from employment conditions prior to the Union's designation by a majority. The 8(a)(5) and (1) allegations in this respect shall be dismissed.

Violations of conduct. In this area, the General Counsel has identified the change, as limited to a ban on ''disloyalty.'' The parameters of such a prohibition are sufficiently vague as to preclude any finding that this newly announced condition of work was ''necessary to the protection of the core purposes of the enterprise.'' *GHR Energy Corp.*, 294 NLRB 1011 (1989). Accordingly, by initially announcing this limitation on employee behavior without negotiating, the Respondent violated Section 8(a)(5) and (1) of the Act.

Clarifying notes (disciplinary procedures). The 1990 revision displaces a specified progressive system of discipline by adoption of an unstructured, somewhat garbled set of guidelines which have the net effect of providing management with a free hand in invoking any of the specified options, such as counselling, reprimands, probation, suspension, and discharge. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally effecting these changes. *Migali Industries*, 285 NLRB 820 (1987); *CIBA-GEIGY Pharmaceuticals Div. v. NLRB*, 722 F.2d 1120, 1124–1125 (3d Cir. 1983).

b. *The information request*

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing, upon request to provide the Union with copies of its contracts with hired general practitioners. The Respondent admits that this information was requested and that it stood firm on its position that there would be no response.

For obvious reasons, the optometrists opposed the Respondent's use of general practitioners to perform their work. Issues existed as to their use to reduce the bargaining unit and to curtail employment opportunities for optometrists. According to the uncontradicted testimony of Enid Molinary, at a negotiating session on June 19, as well as an earlier occasion, the Respondent was informed that the general practitioner contracts were needed as a means of determining their number and method of compensation.

In agreement with the General Counsel, since the optometrists and general practitioners performed the same work, yet the latter were excluded from the bargaining unit, the benefits enjoyed by these competing groups was relevant to fair assessment of positions advanced by the Respondent at the bargaining table, if for nothing else to assure that one group was not being played off against the other. Moreover, equal pay for equal work is inherently ripe for negotiation, and the employment contracts of the general practitioners would furnish a comprehensive, reasonably reliable, reference point in the quest for a a fair settlement. In sum, the information was necessary to the Union's representation of unit employees, and hence the Respondent violated Section 8(a)(5) and (1) of the Act by failing to respond. See, e.g., *NLRB v. Leland Stanford Jr. University*, 715 F.2d 473 (9th Cir. 1983)

c. *The negotiations; overall bad faith*

Finally, the complaint alleges that, between April and June 1990,[56] the Respondent engaged in bad-faith bargaining by failing to make a wage proposal, by proposing a reduction in basic salaries and sick leave and annual leave, and by failing to make counterproposals with respect to other issues in negotiations, all for the purpose of avoiding agreement.

[52] Basically, the 1990 revisions were announced in a memo dated November 10, 1989. (R. Exh. 8(a).) However, here again, the Respondent acted after the Union's certification.

[53] The discount issue is not specified and logically is not embraced, directly or by implication, in any topic listed in the agenda that Caceres purports to have followed at that meeting. (R. Exh. 19(a).)

[54] R. Exh. 7(b).

[55] R. Exh. 7(c).

[56] For purposes of this discussion, all dates refer to 1990, unless otherwise indicated.

Pursuant to claims of subjective bad faith, ''[t]he problem is essentially to determine from the record the intention or state of mind of the [employer] in the matter of its negotiations with the Union.''[57] The affirmative burden is formidable. ''[A] company may use its relative strength to press for contract terms favorable to itself, [but] it may not use its strength to engage in futile or sham negotiations with the intention of never reaching agreement.'' *Roman Iron Works*, 275 NLRB 449, 452 (1985). Thus, the General Counsel must draw the line between hard bargaining in quest of a favorable contract, which is perfectly legitimate, and a time consuming, exercise through which the employer, under the guise of good-faith negotiation, seeks to manipulate the process to achieve ends inimical to the principles of collective bargaining. Moreover, the proof warranting an inference of bad faith must be sufficiently definitive to further Congressional recognition that collective bargaining is a private process, which provides the parties latitude to formulate their own bargaining strategies without governmental interference. To this end, any such finding must recognize the Board's status as referee over a procedure, which, if honestly pursued, will result in an outcome compatible with the economic strength of the parties.[58] The evidence must show more than what may be gleaned from second guessing a party as to the number of concessions, or the quality or fairness of any proposal, made.[59] ''The Board is not permitted, under the guise of finding bad faith to require the employer to contract in a way which the Board deems proper, nor may the Board ''directly or indirectly compel concessions or otherwise sit in judgment upon the substantive terms of collective-bargaining agreements.'' *KB Resources*, 294 NLRB 908 (1989).

Here, the first formal bargaining session was held on April 26, the last on June 25. All told, the parties met on only seven occasions. Negotiations apparently ended in undeclared suspension without indication that the parties had reached an impasse. This occurred without any showing whatever that the Employer at any time had declared a ''final'' position with respect to any unresolved issue. Rather than seek additional negotiations, the Union, more than a month after the last session, on July 30, filed an amended unfair labor practice in Case 24–CA–6199, specifying that the Respondent had engaged in ''surface bargaining.''

The negotiating history shows that, prior to the formal onset of negotiations, the Union, in November 1989, met with Mabel Aponte, who was in company of attorneys associated with the law firm that previously represented the Respondent. At that time, Dr. Enid Molinary orally presented an initial contract proposal. Once reduced to writing, the demands were delivered to the Respondent's attorney by Molinary, personally, on February 20.[60] Receipt was acknowledged by the Respondent's letter dated March 8.[61]

On March 19, the Respondent's attorney wrote the Union's attorney suggesting meeting dates.[62] The Company received no response. It followed up by letter of April 10.[63] Later, the Union's attorney confirmed that the originally proposed dates were acceptable.

Molinary and Dr. Carole Lopez Betancourt testified on behalf of the General Counsel as to what transpired at the bargaining table, with Aponte, called to offer the the Respondent's version.

The first bargaining session was held on April 26. The meeting opened with an indication on behalf of the Respondent that Attorney Gonzalez would act as its spokesperson. The Union countered that it would speak through all attending optometrists. When Attorney Gonzalez offered that this would be an awkward means of negotiating, the Union agreed to designate Dr. Enid Molinary as its spokesperson.

Attorney Gonzalez prefaced the discussions by announcing ''the rules of the game.''[64] The Company then submitted an initial contract proposal.[65] Piqued at the delay in submitting any proposal and an alleged declaration on the part of Attorney Gonzalez that this would be the guide to negotiations,[66] union negotiators angrily declined to even look at the Company's proposal.[67]

The discussion of substantive issues, when opened, produced an objection by the Company to the Union's proposed statement of principles, insofar as it declared that the purpose of the agreement was to improve wages and conditions of work for optometrists.[68] According to Betancourt, Attorney Gonzalez stated that the language was too broad and could later provide problems in arbitration. The statement of purpose was reworded, apparently to the satisfaction of the parties. Further accords were achieved with respect to union

[57] *NLRB v. National Shoes*, 208 F.2d 688, 691–692 (2d Cir. 1953).

[58] *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107–108 (1970).

[59] *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952).

[60] Molinary testified that the proposals were forwarded by mail in November or December, but lost, requiring personal delivery of a second copy. G.C. Exh. 14(a).

[61] R. Exh. 11.

[62] R. Exh. 12.

[63] R. Exh. 13.

[64] Attorney Gonzalez read from a document in evidence as R. Exh. 13. I see nothing in that document of an offensive nature. In the main, it includes suggestions and relevant inquiries, while seeking union assent to a protocol for collective bargaining.

[65] R. Exh. 15.

[66] The Union opposed this, taking the position that the Company's proposal was an inappropriate guide because, while the Company had several months to consider the Union's package, the latter had no opportunity to consider that of the Employer. Aponte testified that the Union expressed that its original proposal should be the sole guide. On cross-examination, Dr. Betancourt testified that the Respondent's attorney rejected the Union's agreement, stating that it was worded in a fashion that precluded its use as a vehicle for negotiation. She claims that the optometrists were shocked by the criticism, and therefore went into caucus. I reject Betancourt's testimony insofar as she suggests that the Respondent insisted on its proposal being the sole guide. I find based on the entire record that the argument centered on demands by each side that its proposal be the guide. Understandably, this produced a dispute with the parties arguing for some 45 minutes as to whether to proceed on the basis of the company or union proposal. The dispute finally was resolved by agreement that the parties rely on an article-by-article dialogue.

[67] Dr. Molinary testified that Attorney Gonzalez ''tried to present a collective-bargaining agreement.'' The Union's refusal to even accept a copy was never relaxed. It at no time during the negotiations, altered its posture in this respect. This, despite the fact that the Union was alerted in advance that the Company's proposal would be available in this timeframe. In this connection, it is noted that the Respondent's counsel wrote the Union's attorney on March 19, 1990, advising of its difficulty in formulating an initial proposal. The former indicated that the Employer's offer should be available during the ''last week of April.'' (R. Exh. 12.) Aponte testified, without contradiction, that the Union did not respond.

[68] G.C. Exh. 14(a).

proposals pertaining to time off for work accidents (art. XI) and tax withholding (art. XXIII). Partial agreement was achieved on customer demands for prescriptions (art. XX). After reviewing both proposals, the last issue discussed was the Company's wage proposal, which was $18,000 the first 2 years, $20,000, during the third year, plus a fee of $5 per examination during the first 3 years. The Company's proposal raised the base salary to $22,000 during the fourth year, with an increase in the examination commission to $7. At the time, salaries for optometrists were listed in individual contracts at $32,000, plus commissions. Betancourt was earning $37,000 at the time.[69] The Union at all times sought to incorporate the $32,000 salary figure as a minimum in the collective-bargaining agreement; no increase was ever sought. Vacation and sick leave was also discussed. At the time, Betancourt enjoyed 14 vacation days and 10 sick days annually, while Molinary earned 10 and 10. The Company's proposal would have downgraded this to five and three. It will be recalled that the reduction in salary, vacation, and sick leave is identified in the complaint as substantiating the surface bargaining allegation.

The second session was held on May 1. The Company explained its scaled-down wage proposal as founded on management's interest in developing a compensation scheme based on productivity. The Union indicated that it rejected the Company's proposal because the optometrists were already earning at least $32,000 annually. Dr. Betancourt added that at this meeting, the Respondent announced opposition to a union shop arrangement. It is clear from Aponte's testimony that the Respondent opposed a union shop and checkoff on the stated ground that it wished the newly hired to make up their own minds on the issue of union membership.

On May 3, discussion centered on vacations, sick leave and the the Respondent's use of private practitioners. According to Molinary, the Union reaffirmed resistance to the Employer's proposed reduction to 5 days' vacation and 3 days for sick leave. She further testified that the Union's attorney alerted the Company to a judicial decision barring use of general medical doctors to practice optometry without certification.[70] Betancourt testified that at this or the earlier session the parties could not agree on the length of the workday, with both seeking a 7-hour day, but the Employer adding an hour for lunch, and the Union, only a one-half hour.

On May 10, the Union raised an apparent grievance based on the fact that since March, optometrists had been required to work longer hours, but had not received additional compensation from the Respondent. The Union advised that the optometrists were willing to work the additional hours, if paid, or, if not, to be restored to their former shifts. The Respondent replied that the issue was being audited and hence no response could be made at that time, but that, if justified, compensation would be provided for the extra hours.[71] At this meeting, the salary issue was again discussed. Molinary admitted that the Respondent advised that the proposed base salary of $18,000 was not a final offer. However, according to Molinary, the Respondent also stated that it would not operate on the basis the current $32,000 guarantee. The Union indicated that it would insist on holding to current salary levels.

On May 24, the issue of management rights was discussed. The Company asserted that use of private practitioners was a management prerogative, and somewhat of a ''sacred cow.'' The Union's position reminded ''that in Puerto Rico optometry can be practiced by optometrists or ophthalmologist but not by general practitioners.'' The Union questioned the Company's proposal subjecting the optometrists to evaluation by nonprofessionals; namely, the store managers, in the performance of their professional duties. The Company replied that it was not insistent on this arrangement, and that identity of the person selected to make the evaluations would be revealed at a later date.

On June 5, Attorney Gonzalez suggested that a mediator might aid the process. The Union opposed this, suspecting that the mediator would not understand their problems, and hence would would be in position to make a contribution. The issue of lengthened work schedules was again raised, with the Company failing to provide an answer at that point. The Union's attorney requested a letter from management clarifying the latter's position. At this session the Union addressed another grievance. Thus, the optometrists apparently, since January 1990, had not received commissions for fitting colored contact lens, though the individual employment contracts obliged the Respondent to pay $15 for each colored lens dispensed. The Company's response was not described. The Union again inquired as to the status of the Company's salary proposal, with the later replying once more that the $18,000 offered was not final, but ''at that moment'' would not be revised. According to Molinary, the Company inquired as to whether the Union would be willing to develop a graduated wage schedule reflecting a different base salary for newly hired optometrists from the higher rates that would be available to those with seniority. As I understand Molinary, this was opposed by the Union on grounds, that if licensed, all optometrists should receive the same salary.

At the negotiating session of June 19, the work hour and unpaid commission issues were again raised, with the Company advising that these were not appropriate for discussion at the negotiating table, but should be addressed to management representatives independent of the contract talks.[72] The Union, through Attorney Dones renewed its request for a copy of the version of the contract used by the company in securing the services of general practitioners. According to Molinary, the Company refused to supply this document,

[69] Aponte testified that this was part of changes made by Caceres when she took control in June 1989. It was announced to the optometrists and contributed to the reasons for their formation of the Union.

[70] Betancourt did not agree. She viewed the legal restriction as imposing a limited obligation that each store be represented by one certified in optometry. In her view, an uncertified general practitioner could practice optometry if a certified optometrist was also assigned to that store.

[71] Later in the session, the Union caucused. On return, the optometrists threatened to go back to their former schedules. After the Respondent reminded of the legal consequences of such action, the optometrists elected to forbear, stating however, that the Employer to provide its answer on compensation by the May 24 session.

[72] Although Molinary described salary as among the issues removed from the table, she was probably mistaken in this regard, and I construe the Company's position as removing grievances founded on alleged past derelictions, as distinguished from union proposals appropriate for inclusion in a collective-bargaining agreement.

giving no reasons for its position in this regard. Salaries were again discussed, with the Company again stating that the $18,000 figure was not final, and the Union still insisting on $32,000.

On June 19, the Company again proposed mediation, but the Union resisted on grounds that a mediator would not ''have knowledge of what was going on between the company and the optometrists.'' The parties did discuss the Union's proposed grievance/arbitration provision. Pursuant thereto, at the third step, a joint union-management committee was established. According to Molinary, this was opposed by the Company, which did not want that body to include any union representatives.[73] Beyond that, the Union's proposal imposed no time limitation on the initiation of a grievance. The Employer proposed that the employee be given 3 days to contact the Employer's attorney concerning the problem. The Union countered that this was insufficient. The Company indicated that it would accept a 10-day limitation, if the Union agreed to eliminate its representatives from the grievance committee. The Union declined. Dr. Betancourt testified that at one of the last three meetings, the Employer accepted the Union's proposed article XXVI pertaining to ''leave for Union business.''

Aponte testified that the optometrists at that meeting were ''insulted'' by the Respondent's position increasing their daily work shift by 1 hour, that they were provoked to engage in disrespectful behavior toward Aponte. In consequence the Company terminated the meeting of that day. In consequence of this episode, by letter of June 20, Attorney Gonzalez wrote the Union's attorney charging that the optometrists were guilty of inappropriate behavior during negotiations, and in strong terms attempted to persuade that a mediator was necessary, and that union consent to the request for mediation would constitute ''a positive gesture of good faith from *both parties* toward the reaching of an agreement.''[74] The suggestion again went unheeded.

At the outset of the June 25 meeting, documents requested by the Union were given to Attorney Dones. The Union raised the general practitioner, work schedule, commission, and salary issues, but there was no resolution. On salaries, the Respondent reiterated that the $18,000 was not a final offer. Grievance/arbitration was again discussed, but their was no movement by either party. This would prove to be the final meeting.

The foregoing is supplemented by a summary of the issues offered through Molinary. Among the specifics were holidays, with the Union's proposal apparently limited to those that were obligatory under the laws of Puerto Rico, and the Employer voicing uncertainty as to whether the Union's proposal was consistent with statutory requirements. The Employer also opposed the Union's seniority provision which would allow protection against interstore transfers, and also indicated that it had problems with the Union's proposal that at least one optometrist be assigned to each store. Molinary testified that during the early sessions, partial agreement was attained concerning the Union's health insurance proposal. However, the Company opposed any contractual retirement plan, the Union's request for food and mileage in the event of a transfer,[75] checkoff, and a no-strike/no-lockout provision. Finally, Molinary testified that the parties differed over the duration of the agreement, with the Union seeking 2 years and the Company, 4.

The complaint includes no allegation faulting the Respondent with termination of the negotiations. Molinary testified that:

> [N]o other meeting was held because at the end of the last meeting no dates were proposed by Attorney Lidia Gonzalez and she was going to send a copy of those dates to the office of Attorney . . . [Dones] and I think that those letters weren't sent . . . but we never got into meeting anymore. [Emphasis added].

Aponte indicates that the letters were sent, but that there was no response. In any event, the record does not show that, after June 25, the Union took the initiative to assure resumption of negotiations. In this connection, Aponte testified to one possible explanation for this result. Thus, she testified, with confirmation by David Miranda, that Attorney Dones, on behalf of the Union, stated at the June 25 session that it would be inadvisable to continue negotiating unless the Respondent increased its wage offer. Whatever the circumstances, the evidence does not disclose that the Union after June 25, pushed for a resumption of negotiations.

The evaluation of the Respondent's state of mind must turn upon the entire circumstances. The Board recently restated the principles governing such an inquiry in *Hydrotherm, Inc.*, 302 NLRB 990, 993–994 (1991), as follows:

> [G]ood faith bargaining might be quite hard and still lawful. In determining whether a party has bargained in good faith, making a genuine effort to reach agreement, we will seldom find direct evidence of a party's intent to frustrate the bargaining process. Rather we must look at all of its conduct, both away from and at the table, including the substance of the proposals on which the party has insisted. Such an examination is not intended to measure the intrinsic work of the proposals, but instead to determine whether, in combination and by the manner in which they are urged, they evince a mindset open to agreement or one that is opposed to true give-and-take. [Citations omitted.]

The General Counsel's capacity to prove a ''mindset [closed] to agreement'' through a preponderance of the evidence is complicated on this record by a number of factors. This was not a classic example of experts wending there way through the subtleties of collective bargaining. In the early summer 1989, Caceres acquired the Respondent and announced her intention to implement new measures that would reduce the job freedom, status and earnings of the optometrists. The optometrists fought back by organizing themselves into a Union; their purpose being to head off the Caceres agenda. Negotiations opened on an antagonistic note, with an immediate struggle for the upper hand. Caceres, on one side, held to the belief that her former husband had pam-

[73] It does not appear that the Respondent resisted arbitration of unresolved grievances, precluding an assumption that it sought exclusive discretion over all disputes.

[74] R. Exh. 16.

[75] The Respondent opined that the optometrists were responsible for their own expenses within 100 miles of their assigned branch.

pered the optometrists, whose services were not producing cost-effective revenues. On the other side sat those offended by this woman and her agenda of degradation. Egos were on a collision course. It is not surprising that the struggle for control led to an exercise in bashing, and ultimate collapse of the negotiations, for which the Employer, could not alone be faulted. The Union was persistent in its rejection of mediation. The Union was unwavering in its flat refusal to accept possession of the Employer's written proposal, thus, denying itself opportunity for a studied approach to the areas of dispute.[76] The Union did not press for continued negotiation after June 25, even though the Respondent had indicated that its position on salaries was not final, and despite the fact that the Respondent had not declared a final position on any open issue. Moreover, as I understand the testimony of Dr. Betancourt, the Union condoned the disruption of negotiations through the presentation of grievances or ''personal affairs,'' which ''brought up a lot of tension sometimes.'' To say the least, neither party had a monopoly over the causes of acrimony and delay, or the charges and countercharges that, in the end, produced a termination of negotiations before either side had allowed themselves time to relax with the process and create a climate for conciliation, rather than one in which pride was the enemy of rational discussion and ultimate agreement.

As is true in any case, the Respondent could have taken a more gracious approach. The optometrists might well have been given what they wanted. And one might be sympathetic to their resentment and frustration with Caceres' ostensible use of the bargaining process to further her managerial program.[77] However, where the Union was formed to head off previously announced downward revisions in employment terms, the law offers no guarantee that collective bargaining will tie management's hand. In fact, the Board has recently confirmed that: ''Proposals that seek deep reductions in allegedly noncompetitive existing benefits are not necessarily indicative of a desire to frustrate negotiations.'' See *Concrete Pipe & Products Corp.*, 305 NLRB 152, 153 (1991).

In the final analysis, the General Counsel's contention is made on a record where a finding of bad faith would be premature and insubstantial. The indefinite suspension of initial negotiations after only seven bargaining sessions, without protest from the Union, and without evidence that the party charged had asserted that any position was final, raises question as to whether Caceres would have held steady had she been given more time to play out her hand. Simply put, there is serious question as to whether agreement would not have been reached had the process continued.

In these circumstances, intervention by the Board is premature and inappropriate. The parties should left as they are in the hope that negotiations will resume with benefit of an understanding that there is no alternative to rationale deliberation. Once exhausted, any inability to reach agreement in that context, would allow fair evaluation of the Respondent's state of mind. Cf. *A-1 King Size Sandwiches*, 265 NLRB 850 (1952). At this point, however, the General Counsel has failed to demonstrate by a preponderance of the evidence that the Respondent engaged in a course of conduct inimical to principles of good-faith collective bargaining,[78] and hence it is concluded that the 8(a)(5) and (1) allegations in this respect have not been substantiated.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by threatening to deny renewal of a personal employment contract in reprisal for union activity.

4. The Respondent violated Section 8(a)(1) of the Act by threatening employees with more stringent conditions of work and termination because they engaged in union activity.

5. The Respondent violated Section 8(a)(3) and (1) of the Act by terminating Dr. Eva Lopez Mendez on March 9, 1990, in reprisal for her union activity.

6. The Respondent violated Section 8(a)(5) and (1) since on or about September 18, 1990, by publishing new employment rules rules altering employee discounts on purchases, banning nondisruptive visitation, excluding optometrists from receiving leave without pay, banning disloyalty, and revising a progressive system of discipline, without notification to, or bargaining with, the certified representative of employees in the following appropriate unit:

> All optometrists employed by the Employer at all of its stores located in the Commonwealth of Puerto Rico, excluding all other employees, office clerical, guards and supervisors as defined in the Act.

7. The Respondent violated Section 8(a)(5) and (1) by unilaterally, without notification or bargaining with the certified representative of the aforesaid employees, changing employment schedules of those who work on their scheduled days off; and by rescinding commissions paid on sale of colored contact lenses.

8. The Respondent violated Section 8(a)(5) and (1) by refusing, upon request of the Union, to furnish copies of indi-

[76] There was no logical justification for the Union's position in this respect. The fact that the Respondent had 2 months, after submission of the Union's proposal, to furnish its own was no reason to encumber the process. In consequence of this spiteful refusal, the Union denied itself advance opportunity to study the Employer's item-by-item position. Instead, it had to be educated in this respect by oral presentation of each provision at the bargaining session. While the Union could hardly gain advantage from this tactic, it was a step that hardly could be expected to avoid misunderstanding or do anything but prolong the process.

[77] The General Counsel contends that the Respondent's offer of regressive wages and annual and sick leave benefits was in consonance with a desire to avoid reaching agreement. On the contrary, the Respondent's position in this respect, as well as much of the unlawful unilateral action, was the essence of a fight to preserve a managerial philosophy that had prompted union activity in the first place. I know of no rule that requires an employer to make concessions with respect to preorganizational personnel policies or be faced with a meritorious surface bargaining charge.

[78] I have not overlooked the unfair labor practices heretofore found, including those accompanied by union animus, and others that, carry no suggestion of untoward motivation, but on technical grounds violated Sec. 8(a)(5). In the circumstances of this case, these offenses do not lessen the ambiguities that arise from the negotiations themselves, and bear an insufficient nexus to assessment of the Respondent's state of mind to suggest an intent to avoid reaching agreement. See *Roman Iron Works*, supra 285 NLRB at 453.

vidual employment contracts entered with its general practitioners—information that is relevant and necessary to the performance of the Union's statutory functions.

9. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Eva Lopez Mendez, it shall be recommended that she be offered immediate reinstatement to her former position and made her whole for any resulting loss of earnings and benefits. Backpay shall be computed on a quarterly basis from date of discharge to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

Having found that the Respondent, on April 17, 1990, unlawfully refused to bargain before eliminating commissions on colored contact lenses and increasing minimum daily work hours on days off, and by effecting a variety of changes in its employment rules, it shall be recommended that the Respondent be ordered to immediately restore the rules in the form that they existed prior to the Union's designation as exclusive bargaining representative, and maintain the earlier conditions of employment until such time as it in good faith negotiates to impasse, or agreement as to each of these changes. It is further recommended that, in the interim, employees shall be made whole for expenses and losses sustained by reason of said changes.

All sums due under the terms of this recommended Order shall include interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[79]

ORDER

The Respondent, Optica Lee Borinquen, Inc., Guaynabo, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge or more stringent conditions of work because they engage in union activity.

(b) Discouraging union membership by discharging, or in any other manner discriminating with respect to wages, hours, or other terms and conditions or tenure of employment.

(c) Refusing to bargain in good faith with the Union by modifying employee discounts on purchases, by deeming employees to be ineligible for leave without pay, by banning nondisruptive visitation during working time, by instituting a ban on disloyal behavior, by altering its progressive system of discipline, by rescinding commissions on sales of color contact lenses, and by lengthening the work shift on unscheduled workdays, without prior notification to, or bargaining with, the certified representative of employees in the following appropriate unit:

> All optometrists employed by the Employer at all of its stores located in the Commonwealth of Puerto Rico, excluding all other employees, office clerical, guards and supervisors as defined in the Act.

(d) Maintaining a ban on disloyal behavior until any such restriction is negotiated in good faith to impasse or agreement with the exclusive bargaining representative of employees in the aforedescribed collective-bargaining unit.

(e) Refusing to bargain in good faith by refusing, upon request, to furnish information relevant and necessary to the Union's performance of its duties as exclusive bargaining representative of employees in the aforedescribed collective-bargaining unit.

(f) In any like or related manner interfering with, coercing, or restraining employees in the exercise of their rights guaranteed by section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

(a) Bargain in good faith with the Union by providing advance notice and a reasonable opportunity to bargain before implementing any change in the wages, hours, or employment conditions of the employees in the appropriate unit described above.

(b) Restore the right of optometrists to enjoy employee discount and purchase benefit program, leave without pay privileges, nondisruptive visitation during working time, a progressive system of discipline, commissions on color contact lenses, and shift schedules on unscheduled workdays, as these conditions existed prior to the Union's designation by a majority, and make whole employees in the above unit for expenses or losses sustained by them with interest, and under the conditions set forth in the remedy section of this decision.

(c) Offer Eva Lopez Mendez immediate and full reinstatement to her former position without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings or benefits resulting from our discrimination against her, plus interest, as set forth in the decision of the administrative law judge.

(d) Immediately provide the Union with copies of all employment contracts entered with currently employed general practitioners.

(e) Remove from its files, delete, and expunge any and all reference to the unlawful termination of Eva Lopez Mendez, notifying her that said action has been taken, and that said unlawful discipline will not be used against her in the future.

(f) Preserve and, on request, make available to the Board and its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its facilities in the Commonwealth of Puerto Rico, copies of the attached notice marked ''Appendix.''[80]

[79] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[80] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the

Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notice is not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with more stringent conditions of work or discharge if they designate a union as their representative.

WE WILL NOT discourage membership in a labor organization by discharging, or in any other manner discriminating against our employees with respect to their wages, hours, or other terms and conditions or tenure of employment.

WE WILL NOT refuse to bargain in good faith by modifying employee discounts on purchases, by deeming employees to be ineligible for leave without pay, by banning nondisruptive visitation during working time, by instituting a ban on disloyal behavior, by altering our progressive system of discipline, by rescinding commissions on color contact lenses, and by lengthening the work shift on unscheduled workdays, without prior notification to, or bargaining with, the certified representative of employees in the following appropriate unit:

> All optometrists employed at all of our stores in the Commonwealth of Puerto Rico, excluding all other employees, office clerical, guards and supervisors as defined in the Act.

WE WILL NOT maintain a ban on disloyal behavior until any such restriction is negotiated in good faith to impasse or agreement with the exclusive bargaining representative of employees in the aforedescribed collective-bargaining unit.

WE WILL NOT refuse to bargain in good faith by refusing, on request, to furnish information relevant and necessary to the Union's performance of its duties as exclusive bargaining representative of employees in the aforedescribed collective-bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Eva Lopez Mendez immediate and full reinstatement to her former job without prejudice to her seniority or other rights and privileges previously enjoyed, and WE WILL make her whole for any loss of earnings or other benefits resulting from our discrimination against her, plus interest, as set forth in the decision of the administrative law judge.

WE WILL notify Eva Lopez Mendez that we have removed from our files any reference to the unlawful discipline that we have imposed against her, and that our action in that respect will not be used against her in any way.

WE WILL bargain in good faith by providing the Union advance notice and a reasonable opportunity to bargain before we implement any change in the wages, hours, or employment conditions of the employees in the appropriate unit described above.

WE WILL restore the right of optometrists to enjoy past benefits, including our employee discount and purchase benefit program, leave without pay privileges, nondisruptive visitation during working time, a progressive system of discipline, commissions on color contact lenses, and shift schedules on unscheduled workdays, as these employment conditions existed prior to the Union's designation by a majority, and WE WILL make whole employees in the above unit for expenses or losses sustained by them by reason of our unlawful changes in these terms, with interest, and under the conditions set forth in the decision of the administrative law judge.

WE WILL immediately provide the Union with copies of all our employment contracts entered with currently employed general practitioners.

OPTICA LEE BORINQUEN, INC.